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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 1174

HOWARD DEAN HANSEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Howard Dean Hansen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of conviction of petitioner for grand larceny in the Central Division of United States District Court for the District of South Dakota.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported, but is printed in the Appendix to this opinion (App. 1a-13a). No opinion was written by by the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 25, 1968 (App. 1a-11a). On May 23, 1968 Justice White entered an Order extending the time for filing a Petition for Certiorari to and including June 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. (a) What are the sanctions to be applied by the trial court when after the entry of a Discovery Order pursuant to Rule 16 of the Federal Rules of Criminal Procedure the prosecution fails to comply with the Discovery Order?

(b) Once an Order for Discovery has been granted what discretion does a trial court have in trying to determine if the withheld materials might have been useful to the defense?

(c) Whether the rule of *Dennis* v. *United States,* 384 U.S. 855 should apply to a failure to produce documents within the scope of a Rule 16 Discovery Order?

(d) Whether the violation of the duty of the prosecution to make a disclosure under the provisions of Rule 16 (g) constitute a denial to the petitioner of due process of law?

2. (a) Does an unrebutted showing of the absence from jury service for a period of ten years of a distinct and separate economic class found in the judicial district or community constitute a prima facie case of discrimination in jury selection?

(b) Do the established basic standards for determination of discrimination in the process of jury selec-

tion in cases involving state court proceedings differ from those to be applied in cases involving United States Court proceedings?

(c) Must conscious intentional acts of discrimination in jury selection upon the part of those charged with such selection be shown to make a prima facie case of improper jury selection, or may such a showing be made by showing the results of the methods used by the jury selectors?

(d) When a distinct and separate economic class constituting approximately ten percent of the community has been shown to have been consistently excluded from jury service, what if any burden has a criminal defendant to show individual prejudice?

(e) May an unrebutted and unchallenged Affidavit in Support of a Motion to Challenge a Jury Array which had been stipulated into evidence by the government be considered as a part of a prima facie showing of discrimination in jury selection?

3. Whether the whole of a criminal proceeding may be viewed in its entirety to determine whether the petitioner was deprived of a fair trial?

RULES INVOLVED

Rule 16 of the Rules of Criminal Procedure as amended February 28, 1966 provides:

> "(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or

control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

"(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rules does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. Sec. 3500.

"(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions there-

of, which the defendant intends to produce at the trial and within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

"(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

"(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

"(f) Time of Motions. A motion under this rule may be made only within ten days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent mo-

tion may be made only upon a showing of cause why such motion would be in the interest of justice.

"(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966."

STATEMENT

Petitioner was charged by Indictment dated May 26, 1967 with grand theft of three head of cattle from an Indian on an Indian Reservation in violation of 18 U.S.C. 1152 and 18 U.S.C. 661. (R. Vol. II p. 1)[1]

Previous Indictments had been filed. (R. Vol. I, p. 1; Vol. III, p. 1) Following arraignment on the

[1] References herein to the record of proceedings below will be cited "R" and will refer to the volume and page. This record was before the Court of Appeals and in accordance with the motion of appellant the Clerk of the Court of Appeals was authorized to transmit the original record including the typewritten transcript of testimony to this Court. This record consists of six volumes each individually paginated except Vol. V which is the second volume of the typewritten transcript. Reference to the printed joint appendix will be cited "App.".

Indictment of March 13, 1967 a Motion for Discovery was filed. (R. Vol. I, p. 2) After hearing a Pre-trial Order was entered granting the discovery motion. (R. Vol. I, p. 19) This Order in part provided:

> "It was ordered that copies of any papers, documents, or books of livestock commission companies, sales barn, livestock buyer or livestock seller, which are in the possession of the United States or any agent thereof, intended to be used by the government at trial, shall be delivered to counsel for the defendant on or before May 1, 1967." (R. Vol. I, p. 20)

Certain records of livestock commission companies and livestock buyers were turned over to counsel for petitioner prior to trial.

During the trial the government offered in evidence seventeen exhibits which had never been shown to the Court or counsel for the petitioner. These seventeen exhibits were records of livestock transactions and were clearly within the scope of the pre-trial Order. (R. Vol. IV, pp. 274-275; p. 291; pp. 223-226; Vol. V, pp. 627-641) Of the seventeen exhibits thirteen were admitted into evidence with four later being stricken by the Court for failure of the government to connect them up with the defendant. Thirteen of the seventeen exhibits were "buyer sheets",[2] which were records of sales barns and cattle buyers showing cattle bought by the buyer named on the sheet on the particular date shown on the buyer's sheet. Some of these were cattle

[2] For some reason the exhibits introduced at trial were not included in the record forwarded to the Court of Appeals by the District Court Clerk. If Certiorari is granted a motion will be presented to have these exhibits made a part of the record and forwarded to this Court.

purchased from the petitioner, or purchased from persons who originally purchased from the petitioner.

Prior to trial petitioner filed a motion to challenge the jury array. (R. Vol. II, pp. 2-4) An Affidavit in support of this motion was also filed. (R. Vol. I pp. 49-56) A hearing was held on the Motion challenging the jury array and the Affidavit was stipulated into evidence. (R. Vol. IV, p. 23) Four reports from the Bureau of Census were admitted into evidence. (R. Vol. IV, pp. 23-24) Two witnesses were called upon behalf of petitioner. (R. Vol. IV, pp. 25-57)

The Affidavit in support of Motion and evidence presented at the hearing on the Motion to challenge the jury array showed that of the fifteen counties comprising the Central Division of the United States District Court for the District of South Dakota 9.1% were employed as farm laborers or farm foremen and 3.5% were employed as laborers. (R. Vol. I, p. 51) The government conceded that farm laborers and farm foremen are a separate economic class of the community. (App. p. 5a) Mr. Warren May, an attorney who had been practicing before the United States District Court for the Central Division for eighteen years testified that he had reviewed the jury panel for each term of that Court for at least the past ten years and that few if any farm laborers or farm foremen had ever been called for jury service. (R. Vol. pp. 28-29) Mr. May further testified that in almost all cases the jurors called for service in the Central Division of the United States District Court for the District of South Dakota were from the upper economic and social strata. (R. Vol. IV, pp. 41-42)

The Affidavit in support of the motion based upon defendant's exhibits 1, 2, 3 and 4 showed the median

family income in the Central Division to be less than $4,000.00 per year. (R. Vol. I, p. 50) That there were no farm laborers or common laborers on the jury panel called for the May 1967 term. (R. Vol. II, p. 16)

The government offered no witnesses in rebuttal other than a Deputy Clerk whose only testimony was that she typed the letters for the Clerk of Courts who was responsible for selection of one-half of the jury panel. She testified that she knew nothing of how the Clerk selected the names of jurors and that she knew nothing of the methods employed by the Jury Commissioner, Mr. Francis Reagen, who selected fifty percent of the jurors. (R. Vol. IV, pp. 64, 66-70, 72)

The motion challenging the jury array was denied.

From the evidence admitted during the government's case the following appeared:

In October of 1965 Jerome Irving, an Indian ranching on the Crow Creek Indian Reservation, was missing some cattle. (R. Vol. IV, pp. 134-136) That Irving's cattle were branded with a reverse RV connected brand.

That the petitioner worked on a ranch belonging to his mother in the same general area as the ranch of Mr. Irving. On October 5, 1965 petitioner sold fourteen head of cattle at the Magness Faulkton Livestock Exchange in Faulkton, South Dakota, and on October 26, 1965 petitioner sold twenty-five head of cattle at the same sale barn. (R. Vol. IV, pp. 263-265, 287-290)

Of the cattle sold by appellant a Mr. Bill Henderson purchased six head. The six head purchased by Mr. Henderson were mixed with other cattle which he had purchased in the same general area and all of these cattle were fed by Mr. Henderson during the winter of

1965 and 1966. On April 21, 1966 Henderson sold seventy-one head of cattle, which included the six which were purchased from Petitioner, at the Highmore Livestock Exchange in Highmore, South Dakota. (R. Vol. IV, pp. 307-314)

Of the seventy-one head of cattle sold by Henderson in Highmore five were purchased by a Ray Anderson. (R. Vol. IV, p. 309) On the same day Anderson purchased one hundred eleven other head of cattle at the same sale barn. The one hundred sixteen head of cattle purchased by Anderson, which included five head purchased from Henderson, were combined with other cattle purchased by Anderson in the same area at approximately the same time to make up a herd of approximately 300 head of cattle which were shipped by Anderson to a Kenneth O'Hare at Ainsworth, Nebraska. (R. Vol. IV, pp. 347-348)

Of the seventy-one head of cattle sold by Henderson on April 21, 1966 in Highmore one was purchased by a Sylvester Schmidt.

Of the cattle sold by petitioner in Faulkton on October 26, 1965, three were purchased by Gerald Boekelheide and were combined with some 221 or 222 head of other cattle purchased by Boekelheide in the same area during the fall of 1965 and were shipped by Boekelheide to Dexter Gunderson of Irene, South Dakota. (R. Vol. V, pp. 357-365)

Later in 1966 or 1967 investigators found two or three heifers in O'Hare's pasture with Irving's brand on them. They also found one cow in Gunderson's pasture with Irving's brand on it. The cow purchased by Schmidt also had what was alleged to be Irving's brand upon it. (R. Vol. V, pp. 391-394)

Irving, the complaining witness, was shown to be a poor operator who was absent from his ranch upon many occasions and for extended periods, who drank daily and kept no records as to the number of head of cattle that he owned but relied upon the annual check of the Production Credit Association who had a mortgage on his cattle to determine the number of cattle that he owned and the year's production. There was considerable conflict in the testimony concerning death losses of cattle by Irving and his method of operation.

The thirteen buyer's sheets which the government presented and offered in evidence at the trial were buyer's sheets showing purchases by Boekelheide, Henderson, Anderson and O'Hare. These sheets showed not only the cattle purchased on the particular dates shown on the sheets by these people from the petitioner but also purchases from persons other than the petitioner. At the time of the introduction of each of the exhibits by the government petitioner objected to the introduction of the exhibits into evidence for the reason that they were within the purview of the discovery order and had not been shown to the Court or to counsel for the petitioner, or in the alternative for a continuance for the purpose of making further investigation based upon the material contained in such exhibits, or in the alternative for a mistrial. The objection to the exhibits was in each instance overruled and the motions denied. (R. Vol. IV, pp. 274-275, p. 291, pp. 223-226, Vol. V, pp. 627-641) Irving admitted that in 1963 he had branded at least one of petitioner's family's cattle and had later given petitioner a bill of sale to the particular cow which he had branded. (R. Vol. IV, pp. 155-161-166)

The petitioner did not testify upon his own behalf.

Numerous fact witnesses testified in support of petitioner's defense as to Irving's method of operation, death losses by Irving in the past, and inconsistencies in the brand alleged by Irving to have been put on the cattle which he claimed were stolen and those sold by him the year before. (R. Vol. V, pp. 482-615) The jury after deliberating from 3:00 p.m. to 10:30 p.m., returned a verdict of guilty. (R. Vol. V, pp. 692-696) Petitioner was sentenced to four years imprisonment and to a One thousand ($1,000.00) dollar fine. (R. Vol. V, pp. 710-711)

REASONS FOR GRANTING THE WRIT

1. Rule 16 of the Rules of Criminal Procedure is a new rule. Section (g) of that rule makes the duty to disclose material subject to a discovery order continuing. The rule is unclear as to the authority of the trial court to determine if undisclosed matters might have been helpful to a defendant's counsel in investigating the case, in preparing for trial, or in preparing for cross-examination of the government's witnesses.

The rule provides certain sanctions which may be imposed in the event of non-compliance,[3] but the phrase "or it may enter such other order as it deems just under the cricumstances" is not clear. It is this alternative which has and will present problems to the Courts. The duties of the trial court, the rights of a

[3] "If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the Court may order such party to permit the discovery or inspection of materials not previously disclosed, or grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

criminal defendant and the extent of a Court's discretion in a case of non-disclosure of material subject to a discovery order should be made clear early in the history of this rule. Guidelines must be established. Petitioner believes this case presents all of the requirements to allow this Court to clarify Rule 16 and set forth such guidelines.

The Court below while holding that the exhibits not furnished to petitioner's counsel should have been so furnished, was of the opinion that "Even if error was committed by the trial court in failing to apply any of the sanctions permissible under Rule 16 (g), the error must be prejudicial to the defendant's substantial rights before the case should be reversed on that ground," and then found that such error was not prejudicial. (App. p. 12a) The Court below was also of the opinion that the matter of sanctions was discretionary with the trial court. The opinion cited *Gevinson* v. *United States,* 358 F. 2d 761, 766 (1966), cert. denied, 385 U.S. 823, as standing for the proposition that an application for relief under Rule 16 is a matter within the sound discretion of the Court, and that the controlling test would be whether there was an abuse of that discretion. The Court clearly confused the discretion vested in the trial court to determine whether or not a motion for discovery should be granted with the discretion with which a trial court is vested when after issuing a discovery order matters within the purview of that order are not disclosed. The discretion of the trial court, once a discovery order has been issued, is analogous to that set forth in *Dennis* v. *United States,* 384 U.S. 855 at 874-875:

> "In any event, 'it will be extremely difficult for even the most able and experienced trial judge

under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' Pittsburgh Plate Glass, 360 U.S., at 410, 79 S. Ct. at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process: For example, to cause the elimination of extraneous matter and to rule on applications by the government for protective orders in unusual situations, such as those involving the nation's security or clearcut dangers to individuals who are identified by the testimony produced."

Once a trial court has determined that a discovery order should be entered the amount of discretion vested in the trial court to determine whether materials not furnished were or were not prejudicial to a defendant is, under the *Dennis* rule, strictly limited.

As stated in *Dennis* the disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice. It is essential to the ability of criminal defendants to receive disclosure of relevant materials and to the general search for truth in a criminal proceeding that a determination be made as to what test of harmless error is to apply to violations of discovery orders issued pursuant to Rule 16.

The decision below did not set forth any standard for determining when non-disclosure will be considered harmless error and when such non-disclosure should be held to be prejudicial. The opinion rather attempted to determine whether or not the non-disclosed materials might have been helpful to petitioner and petitioner's counsel in preparation for trial and in cross-examination of witnesses and held that such non-disclosed materials were merely supplementary to and explanatory of other evidence made available to petitioner's counsel. Such was not the fact.

This was a wholly circumstantial evidence case. In no instance was any animal found in the possession of a direct purchaser from the petitioner. In every instance cattle purchased from the petitioner had been mixed with other cattle purchased in the same area at approximately the same time and had been resold by the original purchaser with cattle acquired from persons other than the petitioner. The buyer's sheets showed more than the seller's sheets which had been furnished by the government to petitioner's counsel. The seller's sheets showed only the cattle sold by petitioner and the purchasers from him. The buyer's sheets showed the cattle purchased by the buyers from petitioner and other cattle purchased by those buyers on the same day from sellers other than the petitioner. Given these buyer's sheets in advance, petitioner's counsel would have been in a position to further investigate the source or sources of the entire herds from which cattle ultimately identified as those of the complaining witness came. Petitioner would have been prepared to cross-examine the owners of the herds in which such cattle were found as to the source of these cattle in a more knowledgeable manner.

To allow the trial court to review non-disclosed materials and make a determination of what might or might not be useful to the defense would be to severely limit the usefulness of Rule 16 and would be directly contrary to the rules set forth in *Dennis.*

The court below was apparently of the opinion that Rule 16 was designed only to apprise a defendant of the charges against him.[4] The rule clearly contemplates much more than a mere apprisal of the charges. See notes of Advisory Committee on Rules, 18 U.S.C.A., Rule 16, 1967 Cumulative Annual Pocket Part, p. 176-178.

Once a discovery order has been entered pursuant to Rule 16 the duty to disclose is clear and absolute. Early in the history of Rule 16 a determination should be made as to whether or not the failure to make such disclosure constitutes a denial of due process of law within the rule set forth in *Giles* v. *Maryland,* 386 U.S. 66.

Whether petitioner has been denied due process of law, and was by the failure of the government to disclose thwarted in his search for the truth and in preparation for trial and denied his rights under Rule 16 pose very serious and substantial constitutional issues. Petitioner believes that this case contains all of the elements and is appropriate for a clear determination by this Court of the rights and duties arising from Rule 16 and the determination of a standard for the determination of harmless or prejudicial error resulting from violations of the duty to disclose under Rule 16.

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4 "Without going in needless detail, the government furnished Hansen with the seller's sheets on all the cattle in question and other information relating to the present owners and location of the cattle. This was certainly sufficient to apprise Hansen of the charges against him."

2. The right of a criminal defendant to a trial by a jury selected in such a manner as to insure a reasonable cross section of the community without the exclusion of any cognizable or recognizable group or class has long ago been declared by this Court.[5] Recently many cases have come before this Court raising the issue of what constitutes a discriminatory exclusion of any particular group and of the burden imposed upon a defendant to show discrimination in the selection of jurors.[6]

Many of the recent cases have dealt with the problem of jury practices under state court procedures. In *Hernandez* v. *State of Texas,* 347 U.S. 475, 481, 482, it was held that a showing of long continued exclusion of a certain class from jury service over a long period of time was sufficient to show discrimination in the selection of jurors and that "The result bespeaks discrimination, *whether or not it was a conscious decision on the part of any individual jury commissioner.*" See also *Coleman* v. *Alabama,* 88 S. Ct. 2, *Whitus* v. *State of Georgia,* 87 S. Ct. 643, *Smith* v. *Texas,* 311 U.S. 128. The Court below held "Most of the cases dealing with jury service discrimination are based on state laws and state court practices, and the standards applied to determine the validity of jury selection methods in federal cases are different from the standards applied to

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[5] Strauder v. West Virginia, 100 U.S. 303; Neal v. State of Mississippi, 162 U.S. 565; Ballard v. U.S., 329 U.S. 187; Glasser v. U. S., 315 U.S. 60; Smith v. State of Texas, 311 U.S. 128; Hill v. State of Texas, 316 U.S. 400; Norris v. State of Alabama, 294 U.S. 587.

[6] Avery v. State of Georgia, 345 U.S. 559; Reece v. State of Georgia, 350 U.S. 85; Hernandez v. State of Texas, 347 U.S. 475; Eubanks v. State of Louisiana, 356 U.S. 584; Coleman v. Alabama. 88 S. Ct. 2, October 16, 1967; Whitus v. State of Georgia, 87 S. Ct. 643, January 23, 1967.

state court cases as the applicable standards rest on a different source of power. *Brown* v. *Allen,* 344 U.S. 443 (1953)." (App. p. 7a) The question of whether or not the rights of a criminal defendant to have a fairly constituted jury are different when he is tried in a state court than when he is tried in a federal court should be determined by this Court.

In *Hernandez* v. *Texas,* 347 U.S. 475, 478, it was stated:

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

In this case the petitioner showed the existence of a distinct class and further showed that few, if any, members of this class had been called for jury service in the United States District Court for the Central Division for the past ten years. For the Courts to hold that if such a showing were made in a state proceeding the constitutional rights of the petitioner would have been violated, and he would have been entitled to a new trial by a fairly constituted jury but that such a showing in federal court does not show a violation of his constitutional rights and did not deprive him of a fair trial, is to make a travesty of the Constitution. If the lower court decision on this point is allowed to stand, it would create a dual standard clearly not contemplated by nor allowable under the United States Constitution.

The question of what constitutes systematic exclusion of any particular wage group, economic or social class in a federal court should be decided. The Court

below was of the opinion that a showing of the existence of a distinct economic class in the community and of the fact that few, if any, members of that class have been called for jury service for at least ten years did not present a prima facie case of jury discrimination. In this respect the Court stated:

> "In this case there is no evidence actually as to how the jury lists were made up. There is no evidence of any intentional or systematic exclusion of either younger persons or farm laborers from the jury list, and the evidence on the lack of farm laborers on the present jury and in some prior lists is vague and nebulous." (App. p. 9a)

The question of how far a defendant must go to make out a prima facie case of jury discrimination should be decided.

In this case the petitioner presented an Affidavit which was stipulated into evidence which Affidavit set forth certain statistical data obtained from United States Bureau of Census reports which reports were admitted into evidence at the hearing and setting forth the results of investigation by the affiant of the makeup of juries in the Central Division of the United States District Court for the District of South Dakota for the past ten years. (R. Vol. I, pp. 49-56) Mr. Warren May testified that in his years of practice before the Court he had had at least one case in every term for the past ten years, that he had fully investigated each jury panel and that upon the basis of review of his office records and in reliance upon his memory few if any farm laborers or common laborers had been called for jury service in the Central Division for the past ten years. (R. Vol. IV, pp. 25-50) Mrs. Rose Mead testified that for a number of years she had been the

manager of the local office of the South Dakota Employment Service, that she received reports from other state offices and that in her opinion farm laborers constituted a distinct group of workers and were a class unto themselves. She further testified that the number of farm laborers had increased since the 1960 census. (R. Vol. IV, pp. 51-57) The government admitted in its Brief in the lower court and the lower court found in its decision that farm laborers constituted a separate economic class in the Central Division. (App. p. 5a)

The government called only one witness in rebuttal, That witness was a Deputy Clerk who testified only as to the letters which the Clerk mailed out to request the names of prospective jurors. She further testified that the Clerk selected one-half of the names that went into the master wheel and that the Jury Commissioner selected the other one-half of the names. She stated that she had nothing to do with the selection process, that she knew nothing of the methods employed by the Jury Commissioner and did not know how the Clerk made the selection or the decision as to who should be called for jury service. (R. Vol. IV, pp. 59-77)

The Court below found that the petitioner failed to make a prima facie case of discrimination in the selection of the jury. The Court apparently rejected the test set forth in *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414 (1955), cert. denied 350 U.S. 971, that jury officials must not exclude any cognizable groups from jury lists through neglect as well as through intentional conduct. And held that actual discrimination will not be presumed but must be proved or admitted.

Whether a criminal defendant can rely upon a showing of long standing exclusion of a cognizable group from jury service to make a prima facie case of jury discrimination in the federal courts or whether he must show intentional exclusion of such a group should once and for all be decided by this Court.

The Court below apparently was of the opinion that while the defendant had claimed individual prejudice he had not shown himself to be a member of the excluded class. Accordingly the opinion of the Court below has indicated that if petitioner is not a member of the class or group excluded from jury service he may not claim prejudice or attack the jury array. Many of the recent cases of this Court setting forth the standards for jury selection have involved members of a specific class or group claiming that members of their group or class have been excluded from jury service. The question of whether or not exclusion of an eligible group from jury service affects the rights of all defendants or only those who are members of the excluded group or class should be determined by this Court. This Court has ruled in *Ballard* v. *U.S.*, 329 U.S. 187, that exclusion of a specific group from jury service injures the entire jury system and tends to destroy the basic democracy and classlessness of jury personnel.

In the opinion of petitioner the lower Court opinion if allowed to stand would create grave and serious questions as to the meaning of the recent decisions of this Court concerning what constitutes a prima facie case of jury discrimination and just what burden a criminal defendant has to make a prima facie showing of such discrimination which will require rebuttal by the government, and would in great part defeat the strides

forward which have been recently made in obtaining and protecting the rights of criminal defendants to a trial by juries selected in such a manner as to reasonably assure a representative cross section of the community. To prevent this Certiorari should be granted.

3. The question of whether or not a combination of all of the facts involved in a criminal proceeding can be viewed in their entirety to determine whether or not a criminal defendant has had a fair trial is worthy of consideration by this Court. The question of whether or not the conduct of the Jury Commissioners in selecting jurors for the Central Division of the District Court for the District of South Dakota, the failure of the government to comply with the provisions of the discovery order and of Rule 16, coupled with other error contained in the record should be considered in its entirety to determine whether such events had a substantial effect on the result of petitioner's trial goes to the very heart of a determination of what constitutes harmless error and what constitutes prejudicial error. See *Kotteakos* v. *United States,* 328 U.S. 750.

Where a series of events such as are shown in the record in this matter exist a criminal defendant should have the right to have the record looked at in its entirety to determine whether or not he received a fair trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Petition for a Writ of Certiorari should be granted.

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